Supreme Court, U.S.
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No. 961609

In The

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR A. LABOUR
Petitioner,
v.
AMERICAN STATES INSURANCE COMPANY
AND ROYAL INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

1. Did the District Court and the Court of Appeals properly apply California law by following numerous California law cases which have held the pollution exclusion in a general liability insurance policy excludes coverage for gradual and expected pollution discharged as part of the normal business operations of the insured?

2. Was the Court of Appeals correct in affirming the District Court's entry of summary judgment in Respondent's favor after finding there was no coverage because the undisputed evidence established that the daily discharges of chemical waste by Petitioner was an admittedly expected part of normal business operations and thus excluded under the pollution exclusion of the policy?

OPINIONS BELOW

The decision of the District Court is reported as *American States Insurance Company v. Sacramento Plating, Inc.*, 861 F.Supp. 964. The decision of the Court of Appeals was issued on a "Not For Publication" basis.

NO CONSTITUTIONAL PROVISION INVOLVED

The petition for writ of certiorari does not raise any constitutional issues. There has been a full trial on the merits in the District Court, thus, there has been no violation of Petitioner's right to substantive or procedural due process.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Royal Insurance Company hereby respectfully prays that the petition for writ of certiorari be denied for the reasons set forth herein.

STATEMENT OF THE CASE

I.

INTRODUCTION

This is an insurance coverage dispute arising from environmental contamination that occurred gradually and incrementally over a twenty-five year period at a Sacramento electroplating facility. Petitioner, who admitted spilling toxic chemicals on a regular basis, sought insurance coverage from Respondent Royal and from another insurer for environmental cleanup costs mandated by the State of California.

Respondent moved for summary judgment on the grounds that the pollution exclusion contained in its liability policy precluded coverage as a matter of law. Co-Respondent American States had previously moved successfully for summary judgment on similar grounds, Petitioner, therefore, filed a Statement of Non-Opposition to the Motion for Summary Judgment, stating as follows:

> "Without conceding the merit of Royal Insurance Company's Motion for Summary Judgment, defendant and counterclaimant Arthur A. Labour hereby indicates his lack of opposition to the court's granting of Royal Insurance Company's motion." (Appendix p. A-1-2)[1/]

Noting Petitioner's Statement of Non-Opposition, the District Court properly granted Respondent's Motion for Summary Judgment holding that the policy's pollution exclusion precluded coverage as a matter of law. (A-6.)

The Royal policy specifically excludes coverage for pollution unless the initial discharge of pollutants is "sudden and accidental." The undisputed and unopposed evidence, some of it submitted by Petitioner, demonstrated that pollutants causing contamination were discharged at the site gradually and incrementally in the course of normal business operations over a twenty-five year period and, thus, were neither sudden nor accidental. Therefore, summary judgment is properly entered by the District Court and affirmed by the Court of Appeals.

Contrary to plaintiff's assertions, evidence of three specific chemical tank leaks did not create any genuine issues of material fact. Two of the three incidents first occurred *after* cancellation of the Royal policy at issue. The District Court's finding that the undisputed evidence showed that each of the three chemical tank leaks and overflows were expected to occur in the normal course of business operations and, therefore, were neither sudden nor accidental, is consistent with existing California and federal law. Petitioner has set forth no grounds regarding this state substantive

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[1/]All references to "Appendix" will hereinafter be referred to as "A-*n*."

law issue to justify the granting of its Petition for Writ of Certiorari and, therefore, his Petition should be denied.

II.

NO VALID GROUNDS EXIST FOR GRANTING PETITIONER'S WRIT OF CERTIORARI

Petitioner has failed to acknowledge that grant of writ of certiorari under Rule 10 is not a matter of right but one of judicial discretion. Thus, unless one of the factors required in granting certiorari is present, review by the Supreme Court should be denied. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). None of the factors which allow the granting of certiorari are present here.

The following factors are to be considered in deciding whether to grant certiorari: (1) whether a conflict exists between the decisions of two Courts of Appeals; (2) whether a conflict exists between a Court of Appeals decision and a decision by a state's highest court; (3) whether a Court of Appeal has drastically departed from the accepted and usual course of judicial proceeding; (4) whether the state court of last resort has decided a federal question in conflict with another state court of last resort; (5) whether a Court of Appeals decision conflicts with a Supreme Court decision; (6) whether a decision involves an important federal question that should be settled by the Supreme Court. (Supreme Court Rule 10.) Petitioner has failed to satisfy even one of these grounds for the granting of certiorari under Rule 10.

The Court of Appeals decision in the instant case is not published, so there is presently no conflicting authority with another Court of Appeals decision; thus, factor one is inapplicable. Factor two is inapplicable because the Supreme Court of California has not yet decided the issues within this case. Contrary to Petitioner's assertions, here the Court of Appeals did not drastically depart from accepted and usual course of judicial proceedings because the Court of Appeal properly applied California law. Thus, factor three is absent. Factor four is likewise missing because no federal question is involved. Additionally, a

right to a writ of certiorari does not exist here because the Court of Appeals decision in the underlying case does not conflict with the Supreme Court case *United States v. Diebold, Inc.*, 369 U.S. 654 (1962), because Petitioner has been "afforded the benefit of all reasonable and logical inferences from the facts adduced" when the Ninth Circuit addressed this case on the merits; making factor five irrelevant in this case. Finally, as set forth above, no federal question exists, and thus, factor six is clearly inapplicable. For the reasons set forth herein, the Court of Appeals applied the correct standard in determining whether a motion for summary judgment granted by the District Court should be affirmed. Thus, Petitioner's petition for writ of certiorari should be denied.

III.

THE DISTRICT COURT AND COURT OF APPEALS' DECISIONS FOLLOWED ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The granting of summary judgment in favor of Respondent was consistent with due process, the Federal Rules and California case law.

A. The District Court And The Court of Appeals Properly Applied California Law

Contrary to Petitioner's assertions, the District Court and the Court of Appeals properly applied California law. In considering the summary judgment motion, the Court of Appeals reviews the record in the light most favorable to the non-moving party, to determine whether there exists genuine issues of material fact exist. *Jones v. Union Pacific R. Co.*, 968 F.2d 937, 940 (9th Cir. 1992). To avoid summary judgment, the opposing party must present affirmative evidence on matters on which it has the burden of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). California has held that the insured bears the initial burden of proving its release or discharge of pollutants was "sudden and accidental." *Service Control Corp. v. Liberty Mutual Insurance Co.*, 46 Cal.App.4th 1047 (1996). Thus,

although the non-moving party is to afforded the benefit of all reasonable and logical inferences from the facts adduced, he must present affirmative evidence on matters on which he has the burden of proof at trial.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); Fed. Rules of Civ. Proc., Rule 56(c). Once that burden is met "'the burden shifts to the opposing party *who must present significant probative evidence* tending to support its claim or defense.' [Citation.]" *Intel Corp. v. Hartford Accident and Indemnity Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991); Fed. Rules of Civ. Proc., Rule 56(e).

Here, the District Court properly granted summary judgment because Petitioner failed to present any affirmative evidence at trial to avoid summary judgment. Respondent established the absence of any genuine issue of material fact and entitlement to judgment as a matter of law by presenting undisputed evidence that contamination took place *gradually and incrementally* over time as the result of *normal business operations*, and therefore, fell within the policy's pollution exclusion.

The pollution exclusion in the Royal policy at issue excludes coverage for damages "arising out of discharge, dispersal, release or escape" of pollutants unless "such discharge, dispersal, release or escape is sudden and accidental."

Under California law, the foregoing exclusion is clear and unambiguous. *Shell Oil Company v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 755. In *Shell Oil*, the California Court held acts that are *expected to occur* are *not accidental:*

> "An 'accidental' event is both unintended and unexpected; omitting either leaves an important part of the word's meaning unexpressed. A 'discharge, dispersal, release or escape' of pollutants that is expected is not accidental, regardless of whether it was not intended." *Shell Oil, supra,* 12 Cal.App.4th at 755.

The undisputed evidence demonstrated that each of the three specific incidents of pollution challenged by Petitioner on appeal *"arose from the general business hazards which [were] expected to occur in Sacramento Plating Inc.'s operation of the Site"* and *"were a normal part of the business at the Site throughout the time it was . . . operated as Sacramento Plating."* (A-12.)

For there to be coverage *"the release* must be *both* 'sudden and accidental.'" *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* 7 Cal.App.4th 1773, 1785 (1993) [emphasis added]. In *ACL Technologies* the California Court of Appeal held:

> "Giving 'sudden' a meaning independent of 'accidental' . . . requires giving it a meaning with a temporal aspect — immediacy, quickness, or abruptness — that does not allow it to cover events, such as happened in this case — that occurred gradually. We therefore conclude . . . that 'sudden and accidental' unambiguously does not include gradual pollution." *ACL Technologies, supra*, 17 Cal.App.4th. at 1787.

It is well settled California law that the exclusion at issue precludes coverage for *gradual* pollution. *Shell, supra*, 12 Cal.App.4th at 754; *ACL Technologies, supra*, 17 Cal.App.4th at 1787. "'Sudden' conveys the sense of an unexpected event that is *abrupt* or *immediate* in nature." *Shell, supra*, 12 Cal.App.4th at 755. "Accordingly, under California law, the 'sudden and accidental' exception to the pollution exclusion necessarily incorporates a notion of temporal brevity." *Smith v. Hughes Aircraft*, 22 F.3d 1432, 1437-1438 (9th Cir. 1993).

It is undisputed that the tank drained in spring 1981 ". . . as a result of the acid copper liquid's corrosion of the metal bottom of the tank." (A-11.) The evidence showed it was *corrosion* of the metal bottom of the tank *not* failure of the tank's interior liner, that resulted in a "discharge, dispersal, release or escape" of pollutants. Moreover, there was no evidence that the tank's interior liner failed as a result of any sudden and accidental event. Rather, the undisputed evidence showed there were no

explosions, fires, earthquakes or other natural disasters which affected any of the equipment at the site. (A-10.)

> "Under such circumstances, where there is no evidence of any traumatic release during the policy period, and substantial evidence of release from gradual corrosion, it is reasonably obvious that an insurer has carried any burden it might have to show applicability of the pollution exclusion." *ACL Technologies, supra*, 17 Cal.App.4th at 1797.

Therefore, as a matter of law, there can be no coverage arising from this incidence since corrosion is, by definition, a *gradual* process, not a sudden event. *ACL Technologies, supra*, 17 Cal.App.4th at 1795; Webster's Collegiate Dictionary, 10th ed., p. 261.

Contrary to Petitioner's assertions, the opinions of the District Court and the Court of Appeals are not in conflict with the decisions in *Montrose* or *Vann*. In *Montrose Chemical Corp. v. Superior Court* 6 Cal.4th 287 (1993), the court held that a claim must be defended unless "undisputed" facts establish no potential for liability under the policy. Likewise, in *Vann v. Travelers Companies* 39 Cal.App.4th 617 (1995), the court held that a finding of no obligation to defend may be made by summary judgment if there are undisputed facts which demonstrate that there is no potential for coverage.

Moreover, coverage, under the Royal policy, is limited to bodily injury or property damage which occurs *during the policy period.* The Royal policy at issue was in effect from March 23, 1982 through *March 23, 1984.* The tank overflow in *June 1984* and the tank leak in *May 1985* could not possibly have resulted in damage *during the policy period* since those events occurred after the end of the policy period. Under California law, the burden is on the insured to establish that the claim falls within the policy coverage. *Royal v. Whittaker* 181 Cal.3d 532, 537 (1986). The California Courts have held this burden requires the insured to prove that the pollution claim is "sudden and accidental". *Aydin v First State ____ Cal.App.4th ____* (Filed April 21, 1997). Here, Petitioner has failed to carry that burden since the undisputed evidence shows that both the daily discharges of chemical waste

and the three chemical tank leaks occurred as an expected part of *normal business operations* at Sacramento Plating. (Perry Declaration, ¶ 12, A-12.)

Petitioner has even acknowledged this in his Petition. (Petition, p. 4.) Because the discharges of chemicals were *expected* to occur in Sacramento Plating's operations, they were neither sudden or accidental and Petitioner produced no evidence to the contrary to the District Court. Thus, these cumulative, incremental discharges of chemicals during the regular business activities were properly deemed by the District Court and the Court of Appeals as neither "sudden" nor "accidental."

B. The Court of Appeals' Decision is Consistent With Other Relevant Ninth Circuit Decisions

The Court of Appeals' Decision is consistent with other relevant Ninth Circuit Decisions. In *Smith v. Hughes Aircraft* 22 F.3d 1432 (9th Cir. 1993), the Ninth Circuit concluded there was no coverage for contamination caused by an insured' long-term business practice of discharging trichloroethylene (TCE) into unlined ponds, because such acts could not be considered "sudden." (*Id.* at 1437.) The Court specifically rejected the insured's contention that certain "sudden" polluting events caused TCE to be dumped directly into the unlined pond. Here, it was shown through undisputed evidence that contamination at the site was caused *gradually* and *incrementally* over a 25-year period by the long-term, daily business practices and operation of Sacramento Plating. Thus, the Ninth Circuit's decision is consistent with its prior holding in *Smith* because likewise here, the evidence also unequivocally demonstrated that the daily chemical spills *and* the three tank leaks were expected to occur in normal business operations, and therefore, were neither "sudden" nor "accidental".

Under California law, as applied by the Ninth Circuit, "the 'sudden and accidental' exception to the pollution exclusion incorporates the notion of temporal brevity." *Aeroquip Corporation v. Aetna Casualty and Surety Co.* 26 F.3d 893, 894 (9th Cir. 1994). In *Aeroquip* the insured had argued, as Petitioner does here, that "sudden" can mean unexpected and

unintended and need not mean anything relating to time, such as abrupt or immediate. *Id.* Petitioner's efforts to break down its long-term waste practices and pollution-prone activities into "temporal components" was properly rejected by the District Court and the Ninth Circuit.

C. The Court of Appeals' Decision is Consistent With Other Federal Court Decisions

Numerous other Federal Courts have held that polluting events that occur in the normal course of business are not "sudden and accidental" within the meaning of the exception to the policy's pollution exclusion. *Cincinnati Insurance v. Flanders Electric Motor Service*, 40 F.3d 146, 154 (7th Cir. 1994); *Ray Industries, Inc. v. Liberty Mutual Insurance Co.*, 974 F.2d 754, 769 (6th Cir. 1992); *A. Johnson & Co., Inc. v. Aetna Cas. & Surety Company*, 933 F.2d 66, 74 (1st Cir. 1991).

These other Federal Court decisions specifically hold events which are expected to occur in the normal course of business at a pollution-prone operation cannot reasonably be considered "sudden and accidental" under similar liability policies at issue in those cases.

For instance, in *Lumbermen's Mutual Casualty Co. v. Belleville Industries, Inc.* 938 F.2d 1423 (1st Cir. 1991), cert. den. 1992 112 S.Ct. 969, a case cited by Petitioner the insured, which discharged PCVs as a result of its business operations, sought to limit its claims to "two allegedly 'sudden and accidental' events": a heavy rainstorm in 1973 and a fire in 1975 in an attempt to avoid the application of the policy's pollution exclusion. *Id.* at 1425. The First Circuit rejected the policyholder's arguments that the pollution exclusion should be applied reasoning that:

> "[F]rom a microanalytical viewpoint, almost any event can be labeled unexpected, since history probably never repeats itself precisely. But such an approach would eviscerate the exclusion for pollution." *Id.* at 1428.

Thus, contrary to Petitioner's assertion, the District Court and the Ninth Circuit opinions are not only consistent with existing California law, but are consistent with other Federal Court

decisions as well. Therefore, neither the District Court or the Ninth Circuit departed from accepted or usual course of judicial proceedings and the petition for writ of certiorari should be denied.

D. Petitioner Failed To Oppose The Motion For Summary Judgment For Which Petitioner Seeks Relief

Petitioner has neglected to inform this Court that he filed a statement of non-opposition to the granting of summary judgment in Respondent's favor. "In order to preserve an issue for appeal, a party must make known to the court any objection to the court's action." *Mendoza v. Block* 27 F.3d 1357, 1360 (9th Cir. 1994). An unequivocal statement of no opposition to a proposed action by the Court precludes consideration of that issue on appeal. *Mendoza, supra*, 27 F.3d at 1360. Because Petitioner failed to file any papers opposing Respondent's motion; failed to submit any evidence, argument or issues of fact; failed to file a separate statement of disputed facts; failed to ask the court to judicially notice his earlier opposition to American States' motion, Petitioner waived his right to seek appellate relief. Petitioner "cannot overturn summary judgment by raising issues of fact on appeal that were not plainly disclosed as a genuine issue in the trial court." *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 812 (9th Cir. 1982.)

"In consenting to an adverse judgment, the appellant waives the right to appeal from the judgment unless the record shows that the appellant clearly intended to preserve the right to appeal." Federal Appellate Practice — Ninth Circuit (1994), § 5.22, 5-35, Lawyer's Cooperative Publishing; *Christian Science v. City and County of San Francisco*, 794 F.2d 1010, 1017 (9th Cir. 1986); *Clapp v. C.I.R.* 875 F.2d 1396, 1398 (9th Cir. 1989). The general rule is that a party consenting to entry of judgment against him or her waives the right to appeal. *Clapp, supra*, 875 F.2d at 1398 [stipulated judgment]; *Christian Science, supra*, 784 F.2d at 1017, amended 792 F.2d 124 (9th Cir. 1986) [order approving settlement].

Petitioner consented to summary judgment in Respondent's favor when he filed a statement of non-opposition, unequivocally

stating that "his lack of opposition to the court's granting of" that motion. (A 1-2.) Accordingly, Petitioner waived the right to appeal and the Court of Appeals properly affirmed summary judgment in Respondent's favor. *United States v. Bechtel Corp.*, 648 F.2d 660, 663 (9th Cir. 1981).

REASONS WHY THE WRIT SHOULD BE DENIED

No valid grounds exist for granting Petitioner's writ of certiorari. The District Court and Court of Appeals' decisions followed accepted and usual course of judicial proceedings. Furthermore, the District Court and the Court of Appeals properly applied California law in deciding that the undisputed evidence that the contamination took place gradually and incrementally over time as a result of normal business operations and thus, fell within the policy's pollution exclusion.

The Court of Appeals' decision is consistent with other relevant Ninth Circuit decisions which hold that when the evidence unequivocally demonstrates that the contamination was caused gradually and incrementally, the pollution is neither sudden nor accidental despite the insured's efforts to break down the pollution-prone activities into temporal components. Additionally, the Court of Appeals' decision is consistent with other Federal Court decisions. Numerous other Federal Courts have held that polluting events that occur in the normal course of business are not sudden and accidental within the meaning of the exception to the policy's pollution exclusion.

The District Court and the Court of Appeals decision are also consistent with public policy. Insureds cannot evade the pollution exclusion by isolating specific instances of environmental harm during the long history of routine chemical spills and later claim coverage for those events which constitute normal business operations of the insured. Otherwise, pollution-prone operations like Sacramento Plating would always be able to defeat the pollution exclusion and manufacture coverage where none exists. Public policy is fostered by the Court of Appeals decision because such a decision discourages insureds from making pollution a part of the normal long-term business operations and practices. The

focus of the concern over environmental pollution by companies such as Sacramento Plating is to eventually stop pollution from becoming a normal and everyday business practice of these operations. Enabling an insured to create coverage from an insurance company for spills which are part of their daily operation, does not achieve this goal.

CONCLUSION

Notwithstanding Petitioner's failure to oppose summary judgment, the District Court and the Court of Appeal thoroughly reviewed, analyzed and evaluated the undisputed facts and applicable law relevant to this case. The District Court's holding is consistent with well-established California and Federal decisions which have already addressed this issue. This is not a case in which warrants review by the Supreme Court.

While acknowledging the important public policy regarding encouraging the clean up of pollution, creating insurance coverage where none exists, drastically impinges on the parties right to contract. Furthermore, public policy is served by the District Court and Court of Appeals' holdings. It is uncontroverted that the policy in this case covers damages caused by "sudden and accidental" events. However, where, as here, the Court has determined that the insured's regular business practices involved long term use and spillage of toxic contamination, no coverage exists. Holding long term polluters accountable for their environmental contamination resulting from their normal business practices, will encourage the cessation of the contamination.

Based on the foregoing, Respondent, Royal Insurance Company, respectfully requests this Court deny Petitioner's Writ of Certiorari.

Dated: May 2, 1997

Respectfully submitted,

ROPERS, MAJESKI, KOHN & BENTLEY

By MARK G. BONINO
Counsel of Record
Attorneys for Respondent
Royal Insurance Company

United States District Court
Eastern District Of California

AMERICAN STATES INSURANCE COMPANY
Plaintiff,

v.

SACRAMENTO PLATING, INC., RICHARD PERRY, ARLENE PERRY, ARTHUR LABOUR, DALE CARTER, RAR MARKETING, INC., ALTA PLATING, AND ALICE KAZANJIAN,
Defendants.

ARTHUR A. LABOUR,
Counter-Claimant,

v.

AMERICAN STATES INSURANCE COMPANY, ROYAL INSURANCE COMPANY,
Counter-Defendants.

CASE NO. CIV-S-93 569 WBS PAN

STATEMENT OF NON-OPPOSITION TO ROYAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

[Eastern District Local Rule 230]

Date: September 26, 1994
Time: 9:00 a.m.
Dept.: Judge Shubb

Without conceding the merits of ROYAL INSURANCE COMPANY's Motion for Summary Judgment, Defendant and Counter-Claimant ARTHUR A. LaBOUR hereby indicates his

lack of opposition to the Court's granting of ROYAL INSURANCE COMPANY's Motion.

HEFNER, STARK & MAROIS

Dated: September 12, 1994

By: DANIEL W. SMITH
STEVEN R. CROOKS
Attorneys for Defendant and Counter-Claimant
Arthur A. Labour

United States District Court
Eastern District of California

AMERICAN STATES INSURANCE COMPANY
Plaintiff,
v.
SACRAMENTO PLATING, INC., RICHARD PERRY, ARLENE PERRY, ARTHUR LABOUR DALE CARTER, RAR MARKETING, INC., ALTA PLATING, AND ALICE KAZANJIAN,
Defendants.

ARTHUR A. LABOUR,
Counter-claimant,
v.
AMERICAN STATES INSURANCE COMPANY, ROYAL INSURANCE COMPANY,
Counter-Defendants.

Case No. CIV-S-93 569 WBS PAN

DECLARATION OF MAILING

I am a citizen of the United States, employed in the City and County of Sacramento. My business address is 2710 Gateway Oaks Drive, Suite 300 South, Sacramento, California 95833. I am over the age of 18 years and not a party to the above-entitled action.

On September 12, 1994, I served the following documents:

STATEMENT OF NON-OPPOSITION TO ROYAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT [Eastern District Local Rule 230]

(XX) **By Mail** on the following party(ies) in said action, in accordance with Code of Civil Procedure §1013(a), by

placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. In the ordinary course of business at Hefner, Stark & Marois, mail placed in that designated area is given the correct amount of postage and is deposited that same day in a United States mailbox in the City of Sacramento, California.

( ) **By Personally Delivering** a true copy thereof, in accordance with Code of Civil Procedure §1011, to the person(s) and at the address(es) set forth below.

( ) **By Overnight Delivery** on the following party(ies) in said action, in accordance with Code of Civil Procedure §1013(c), by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided for, in a designated area for outgoing overnight mail, addressed as set forth below. In the ordinary course of business at Hefner, Stark & Marois, mail placed in that designated area is picked up that same day for delivery the following business day.

( ) **By Facsimile Transmission,** in accordance with Code of Civil Procedure §1013(e), to the following party(ies) at the facsimile number(s) indicated.

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Rancho Cordova, CA 95670

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on September 12, 1994.

/s/ KIM M. WILLIAMS

Kim M. Williams

United States District Court
Eastern District of California

AMERICAN STATES INSURANCE CO.,
Plaintiff,
v.
SACRAMENTO PLATING, INC., *et al.*,
Defendants.

NO. CIV. S-93-0569-WBS/PAN
ORDER

Counter-defendant Royal Insurance Company has moved for summary judgment pursuant to Fed. R. Civ. P. 56(c). Counter-claimant Arthur A. LaBour, the only party to this proceeding with claims against Royal, has filed a statement of non-opposition to Royal's motion pursuant to E.D. Rule 230(c).

For the same reasons the court granted summary judgment in favor of plaintiff/counter-defendant American States Insurance Company, *see American States Ins. Co. v. LaBour*, No. CIV S-93-569-WBS/PAN, 1994 WL 469128 (E.D. Cal. August 29, 1994), the court finds that there is no genuine issue of material fact and Royal is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that Royal Insurance Company's motion for summary judgment be, and the same is, hereby GRANTED.

IT IS FURTHER ORDERED that the hearing on Royal's motion summary judgment now set for September 26, 1994 is hereby VACATED.

DATED: September 13, 1994

WILLIAM B. SHUBB
William B. Shubb
United States District Judge

(SPACE BELOW FOR FILING STAMP ONLY)

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United States District Court
Eastern District of California

AMERICAN STATES INSURANCE COMPANY,
Plaintiff,
v.
SACRAMENTO PLATING, INC.,
RICHARD PERRY, ARLENE PERRY,
ARTHUR LABOUR, DALE CARTER,
RAR MARKETING INC., ALTA PLATING,
AND ALICE KAZANJIAN,
Defendants.

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and Related Cross-Action

CASE NO. CIV-S-93 569 WBS PAN
DECLARATION OF RICHARD J. PERRY

I, RICHARD J. PERRY, declare:

1. I was the general manager of SACRAMENTO PLATING, INC. and an owner of that company from 1963 until October 1988, when I sold the business equipment and operations of SACRAMENTO PLATING, INC. to DALE CARTER. To my knowledge, DALE CARTER did business as "Sacramento Plating" or "Sacramento Plating Company" and continued electroplating operations at 2809, 2817, 2819 and 2821 "S" Street, Sacramento, California (hereinafter "Site") after October 1988.

2. I have personal knowledge of operations at the Site since the early 1950's when the property was being used by Alta Plating. During the 1940's I believe the shop building had been used for tinning. By the time I came to Sacramento in the early 1950's, the Site was being used for an industrial plating works operated by the Kazanjian family under the business name of Alta Plating. I am informed and believe that the Alta Plating operations at the Site became dormant sometime in the early 1960's.

3. In 1957 I began a decorative electroplating facility at 1721 — 16th Street in Sacramento known as A-1 Plating Company. In 1960, the business expanded to 7500 — 14th Avenue, Sacramento, California which became known as "Sacramento Plating." During the years from the early 1950's to 1963, I personally visited the Site at 2809 "S" Street while it was being operated and managed by John Kazanjian under the name Alta Plating. In that time period, I personally observed the industrial electroplating operations five or six times.

4. In or about 1963 my wife, ARLENE PERRY, and I entered into a contract for sale and purchase of the Site with the Kazanjian family. Also in the year 1963, I incorporated my business under the name SACRAMENTO PLATING, INC. During the time period between 1963 and 1965, I moved much of the industrial electroplating equipment I had purchased from the Kazanjians out of the Site and to a location at 18th & "S" Streets where my father and I began operating a separate business which we then called Alta Plating. In approximately 1965, I replaced the removed industrial electroplating equipment at the Site with decorative electroplating equipment moved in from our business at 7500 — 14th Avenue. Thus, for the time period between approximately 1963 and 1988, the property at 2809 which composed the plating and polishing facility was occupied by me and used exclusively in my business known as SACRAMENTO PLATING, INC. The addresses of 2817 and 2819 were a building with two flats which my wife and I rented to tenants. The parcel having the 2821 address contained a small rental office building in the south end of the property. I used the north end of that lot solely for storage of finished bumper inventory.

5. When payments to purchase the property had been completed, my wife and I took title to the Site as owners of the real property in February of 1972 from John and Alice Kazanjian. However, I managed the electroplating facilities at the Site from 1963 until 1988. I was physically at the Site watching and participating in the electroplating processes on a full-time daily basis during those years. My father, until his retirement, managed other business locations of SACRAMENTO PLATING, INC. in those years.

6. The electroplating facility at the Site was a single story building at 2809 "S" Street. The facility had a concrete floor throughout the building. Attached hereto as Exhibit "A" is a diagram from an industrial sewer use permit for which I applied while occupying the Site. The concrete flooring in the electroplating room was designed so that it slanted towards and into a system of concrete drains and a sump which led to a sewer line beneath the ground eventually mixing with other sewer users' wastewater before arriving at the county's sewage treatment plant. By design, any chemical solutions dripped, spilled or otherwise lost in the electroplating process would be deposited on the catwalks (above the concrete flooring) and then onto the concrete flooring of the plating room. From there the liquids would move down the graded concrete surfaces into the concrete drainage system and ultimately to the sanitary sewer.

7. During the electroplating process, various automobile parts to be plated (primarily steel bumpers) were cleaned, rinsed and plated with use of chemical solutions in the plating room. The parts would be immersed in chemical baths with platers (i.e., employees of SACRAMENTO PLATING, INC.) moving the parts by hand from bath to bath through the process. In doing so, the chemicals in liquid form would normally splash and/or drip off the parts, onto the catwalk surfaces and from there to the flooring as each part was being transferred from one chemical bath to the next. Chemical solutions would also drip down the sides of and off the tanks causing a residue on the sides of the tanks.

8. Attached hereto as Exhibit "B" is a true and correct copy of a diagram I created in the 1970's during the time I was working at

the Site. The diagram accurately depicts how parts were dipped and moved in the plating process conducted at the Site during the time I was the Site's manager. A part would be immersed and moved through the fresh water tanks and chemical baths as shown in Steps 1 through 7. It would then be polished in another room before returning to the plating room at which point it would again go through Steps 1 to 7 followed by dipping through additional baths shown in Steps 8 through 13 on the diagram. This was the usual plating procedure for 95% of the parts processed. The other 5% would involve processing materials other than steel; those would go through the first three steps and then through several of the steps on the west side of the plating room floor.

9. In regard to Exhibit "B," chemicals that were spilled, splashed or dripped off the parts were also washed down the slanted flooring into the drainage system and from there into the sewer on a daily basis while the facility was in operation. Tanks shown on the diagram as "fresh water . . ." were designed to be constantly and continuously discharged onto the floor, into the floor drain system and then to the sewer. Additionally, the plating room equipment and flooring was washed down as a part of periodic maintenance and upkeep during my management and the washed down liquid also would have collected on the slanted flooring and moved into the drainage system and eventually into the sewer pipe shown on the diagram which is Exhibit "A."

10. Before 1981, I constructed a cinder block "berm" at the north and south ends of the plating room facility in order to contain any sewage backup or to otherwise protect both the office (at the south end of the structure) and areas of the premises outside the facility (beyond the north end of the structure) from any overflow in the event of a release from any of the tank equipment. Thus, the berm and slanted flooring were designed to act as a holding pond in the event any tanks should release their contents within the plating room's floor space and until such liquids found their way into the drain system and sewer pipe.

11. There were no explosions, fires, earthquakes or other natural disasters which affected any of the equipment at the Site during the years I managed the facility to my knowledge. How-

ever, the following events of which I am aware took place in reference to loss of chemical bath liquids, and the indicated dates are the most specific I can identify since there are no records to my knowledge which document any of them:

Spring 1981 — Drainage of Acid Copper Tank Contents

The acid copper liquid in the 400-gallon tank (see Exhibit "B") is composed of copper sulfate and sulfuric acid, a corrosive solution. This tank was lined with a plastic, rubber-like material which was vulcanized to the tank interior. In Spring 1981, the contents of the tank drained onto the concrete floor and down into the floor drainage system as a result of the acid copper liquid's corrosion of the metal bottom of the tank. I believe this resulted from a hole in or failure of the tank's liner. None of the chemicals from that incident would have gone anywhere other than the building's floor and down into the drain system to my knowledge. I replaced the corroded 400-gallon acid copper tank with two 400-gallon tanks that were thereafter used for the same purpose as the original replaced tank. During my management of SACRAMENTO PLATING, INC's operations at the Site, I experienced no breaks, leaks or any problems with the two 400-gallon tanks.

June 1984 Nickel Plating Tank Overflow

In June 1984 someone (presumably one of the employees) placed a hose in the southernmost of the two 800-gallon nickel plating tanks located within the west side of the building as shown on Exhibit "B". This was done to replenish the tank's solution with water; however, the water was left running too long resulting in an overflow of the chemical bath or solution down onto the slanted concrete flooring and from there into the floor drain system. To my knowledge the overflow did not go anywhere else.

May 1985 — Drainage of Nickel Plating Tank Contents

In May 1985 the northernmost of the nickel plating tanks emptied part of its contents due to a hole in or failure of the lining of that tank. It was a loss of about 400 gallons of the 800-gallon contents which took place over a period of approximately 12-

hours. In that instance the tank released its contents through the southern side wall of the tank at a point near the tank's west end as shown in Exhibit "B." The contents of the tank drained onto the slanted flooring and from there into the floor drain system. The chemical materials would not have gone anywhere other than down the drain to the sewer.

12. The tank content losses described above were not reported to any governmental agencies or to any insurance companies or insurance brokers or agents. These events were not considered insurable by me at the time they occurred. They arose from general business hazards which I expected to occur in SACRAMENTO PLATING, INC.'s operations at the Site, even though I did not want them to happen since replacement of any chemical bath solution is a substantial business expense. These incidents involving loss of tank contents as well as the daily splashing and dripping of chemicals from the baths during the plating of bumpers and other processed parts were a normal part of the business at the Site throughout the time it was occupied by me and operated as SACRAMENTO PLATING, INC.

13. Generally, tanks which contain chemical baths were not drained; additional chemicals in solution were simply added to the tanks from time to time. The only time a chemical bath was ever emptied in whole or in part, other than the three incidents described above, was when that tank was being moved or replaced. The tank to be moved would be drained by pumping its chemical solution contents to a holding tank on a temporary basis while the emptied tank was being moved. Once the emptied tank was moved, the solutions were emptied back into it from the holding tank. This moving process took place on less than five occasions to my recollection from 1963 through October 1988. There were no solution losses or problems during these exchanges of liquids from one tank to another.

14. During each of those occasions when loss of chemical bath solutions resulted from the failure of tank liners or the overflow tank contents, I observed the chemical materials on the concrete flooring which led to the drain. No chemicals drained as a result of these events to anywhere other than the plating room's slanted flooring and from there to the drainage system, eventually into the

sanitary sewer. To my knowledge no chemicals in solution or otherwise were discharged or released outside of or off the plating room's flooring area during the time SACRAMENTO PLATING, INC. was operating under my management.

15. During my management at the Site, the business of SACRAMENTO PLATING, INC. did not use lead in any of the chemical solutions which were part of the decorative electroplating process conducted in the plating room. The following chemicals were used: Muriatic acid, sulfuric acid, copper sulfate, nickel sulfate, nickel chloride, boric acid, chromic acid, cyanide, zinc cyanide, copper cyanide, sodium cyanide, free sodium cyanide, rochelle salts, sodium carbonate, total sodium cyanide, chloride, chromium oxide, sulfate, fluoride, soda ash, sodium bicarbonate, ammonia, sodium hydroxide and hydrochloric acid.

16. In my capacity as manager and owner of SACRAMENTO PLATING, INC. in the years from 1963 through 1988, no one ever complained to me or notified SACRAMENTO PLATING, INC. employees to my knowledge that there were any chemicals or byproducts of the electroplating process of my company found on any surrounding parcels of property or endangering anyone.

I declare under penalty of perjury that the foregoing is true and correct, that I have personal knowledge of said facts and that, if called as a witness, I can testify competently to the truth thereof.

Executed this 18th day of July, 1994 at Sacramento, California.

Richard J. Perry
individually and on behalf
of RAR MARKETING, INC.